

# Federal Procedural Reform and States' Rights; to a More Perfect Union\*

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It is indeed a pleasure to journey to this great University, to renew ties with the distinguished scholars of your faculty, and to speak to you on matters of abiding legal and public interest. What I intend to discuss here concerns the two greatest interests of my professional life: the improvement of the administration of justice under professional leadership, notably that of the federal courts; and the aspiration for and ever-growing accomplishment of national unity for our country wherein the participating assistance of the federal courts is a major factor.

The trend of my remarks is shown by my selection of a title based upon those dynamic words from the Preamble to our Constitution, "in Order to form a more perfect Union." And that is what I hope to see and believe I find—a trend to ever greater national unity, with the federal judicial establishment taking a vital part. Of course the courts are not alone in this movement; the executive and the legislative branches of government can and often do as much or more, notably in times of crisis such as war. But the courts are open and active every day of the year, including, as I have found, often on Sundays. They have perpetual calls to serve as arms of government; and thus the federal courts in particular have a priceless opportunity for leadership and for accomplishment toward the goal I visualize.

You will note that I start with an assumed premise, namely, that the goal of national unity is not only desirable, but its achievement is necessary for our very survival. Perhaps this must be taken on faith or not at all. But, however arrived at, it seems to me clearly demonstrable on all sides. Every year the interconnection of our people nationally becomes the clearer; on financial, on economic, on welfare, on cultural levels, it is as impossible as it is undesirable to try to extricate one area of our country from another and treat it separately. And in the international field, certainly we cannot execute the world leadership now thrust upon us, or even safeguard our own future, if we remain a divided nation of merely separate states. My thesis is that in the particular professional area which is the subject of my present consideration, while the courts

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have done much toward the desired goal, they should actually do more. To some of my hearers this moderate complaint that the activity of the federal judiciary has been, if anything, too limited may seem strange. And yet I am confident that it can be sustained by certain examples from the field of court administration and procedure. As I have had occasion to say elsewhere: "While events national and international do steadily press our people into a closer union, the national courts alone make their possibly gallant, but surely eventually futile, attempts to restore states-rightism."<sup>1</sup>

It is important to recall how the federal courts came into existence. You will remember that under the federal constitution the only court specifically named is the Supreme Court of the United States, and then the Constitution goes on to provide for "such inferior Courts"—a quite deserved description of course—"such inferior Courts as the Congress may from time to time ordain and establish."<sup>2</sup> As we know, there was a debate in the First Congress as to whether or not there should be national courts for the new and struggling republic. Such courts are not a necessity. Two of the outstanding examples of federalism in the world today, Canada and Australia, have no such system. In those quite successful governments the provincial or state courts enforce both the provincial or state law and the federal or national law, subject only to appeal to the highest court, the Supreme Court of Canada or the Supreme Court of Australia. We do not constitutionally need these courts; but the Congress early decided that a federal judicial establishment would have value as adding to the prestige, the strength, and the power of the federal government. The federal courts were thus set up as a proper adjunct and enforcing authority for the struggling federal government. That was the origin, the beginning, of national unity. It was the great opinions of John Marshall which started the government off as a potentially powerful and authoritative exponent of the people's wishes. This remains true even though during the middle years of our country's existence there occurred a falling off of this drive, so that national power became weakened only to experience a vast resurgence during the past two or three generations.

What I have to say is directed particularly to the law students of today, the young people who in a short time (perhaps a couple of decades) will be occupying positions of trust as lawyers, judges, and public officials and who will have the opportunity and the power to shape our legal destiny along lines I now urge. Let me summarize my argument. I suggest first that now our national courts are showing the leadership, which for many years they did not grasp, in activity for the improvement of

<sup>1</sup> *P. Beiersdorf & Co. v. McGohey*, 187 F.2d 14, 17 (2d Cir. 1951) (dissenting opinion).

<sup>2</sup> U.S. CONST. art. III, § 1.

the administration of justice. Next I shall discuss certain doctrines of public importance, mainly, though not wholly, in the constitutional field, which bear on my general topic. Finally I shall come to some of these doctrines, now newly developed, which seem an undesirable interference with these trends toward national unity. Here I may seem to join for a bit that class of critics of the United States Supreme Court which my co-speaker has properly questioned;<sup>3</sup> but actually my mild remarks are quite from the opposite point of view. For, as I have earlier indicated, my own conviction is that the Court, as leader of us in the constitutionally inferior courts, has not gone very far in promoting national trends and actually has not gone as far or as helpfully as it could have done or is likely to do in the future. Indeed, all the many things it does and will do in the direction of national unity are to my mind a vitally necessary part of its constitutional function. So I wish that the whole court, not merely some frequent dissenters, would participate gloriously in realizing the potential for national unity which the federal judicial system presents.

To amplify this headnote I shall first speak of the federal courts as leaders in the movement for the improvement of the administration of justice. What time actually they lost by being unimportant and insignificant! Very likely that was not their fault. How does one become significant? Well, I would not know except that some persons or institutions are propelled by the greatness of events. And now the federal courts can hardly avoid the pressure for leadership. All the things they are called on to do are certainly unusual and extensive, so extensive in fact that even a federal judge cannot begin to know all his jurisdiction. Every so often we federal judges have a new form of appeal in some quite different legal territory, such as an appeal from the Secretary of Agriculture, or an appeal from some examiner of the Naturalization Service, in form an appeal from the Attorney General, and so on. In any event there is infinite diversity in the kinds of things that we are called on to do.

Unfortunately for many years the federal courts took or held no position of leadership in this reform movement. Even in the time, which does not seem so long ago, when I was in law school the federal courts were a practically unknown territory. I can remember when in the year 1912 with a few others I wandered into a course in federal procedure, which counted for only a single hour credit; the professor was obviously bored and made a few general references to the very terrible practice in the federal courts. Then one day when we came in he said, "Well, I think that we had better disband. The Supreme Court has passed new

<sup>3</sup> Anthony Lewis, Washington correspondent of the *New York Times*, who spoke on the same program. See Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305 (1961).

equity rules, and there isn't anything more to teach." Those were the federal equity rules of 1912, a very good beginning in the way of reform, but, as we know, only a bare beginning.<sup>4</sup> To this professor they were so extensive that they had blotted out all he knew and all that he thought we should know. But think of all the major reform from that timid beginning! First we must note the campaign of the American Bar Association for adoption of the legislation granting rule-making power to the Supreme Court, which was passed after the Association gave up the battle as one not able to be accomplished and perhaps not even worthwhile to be accomplished. It was my own associate at the Connecticut Bar, Attorney General Cummings, who took up the fight and pushed the legislation through, to his eternal credit. The statute was passed in 1934 and was soon followed by the Federal Rules of Civil Procedure adopted in 1935-37 and effective in 1938.<sup>5</sup>

It is not here necessary to go into the details of the accomplishments made by the rules; they are now known to the profession generally. One may mention merely the complete union of law and equity, the simple allegations of the pleadings proper, the discovery process, the uncomplicated method of appeal, among other advantages of the new procedure.<sup>6</sup> But I do want to speak here of their total effect. Not only did they revolutionize the procedure throughout the great federal judicial establishment of some ninety District Courts, together with various other federal courts that have copied the procedure, such as the Court of Claims and the several courts of the District of Columbia, but additionally they have been widely copied in the several states. There now appear to be some twenty jurisdictions which have copied them in full. There are an additional six or seven which have rather complete reforms following the federal principles in various details without adopting the system *in toto*.<sup>7</sup> Perhaps some of you may remember that when Texas joined this latter group of states in 1941, I was brash enough to publish an article in this Review twenty years ago expressing my regret that you had not gone further and my hope that you would do so in time.<sup>8</sup> I understand you are still making progress with perhaps a major part of the federal practice at hand and only a short distance left to go. Beyond these are additionally perhaps a dozen states which have adopted substantial

<sup>4</sup> 226 U.S. 645 (app. 1). For references, see CLARK, CODE PLEADING 33 (2d ed. 1947).

<sup>5</sup> This history has been often traced; a succinct summary appears in CLARK, CODE PLEADING 34-45 (2d ed. 1947); and see Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 438-43 (1958).

<sup>6</sup> See general references given in the citations in note 5 *supra*.

<sup>7</sup> For details see Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1959); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 9-9.53 (Wright ed. 1960).

<sup>8</sup> Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 TEXAS L. REV. 4 (1941).

segments of the federal system, such as the discovery or the joinder provisions, while the famous pre-trial rule, Rule 16, is almost universally available. Moreover, there are promising movements approaching fruition in other areas, and there is now hardly a state where there is not agitation among the bar for the federal rules.<sup>9</sup>

It is an interesting fact that, whenever there is agitation for improvement, the federal system is assumed to be the model which must be studied. Since now the bar associations and the profession generally are acquiring the knowledge and the responsibility that they should have assumed long ago and are taking a real and active interest in promoting reform, the leadership of the federal system, whether that system is adopted *in toto* or in part, is basic. No lawyer in this legal area can now be so blind or so obtuse as not to know where the leadership is located. That, I believe, should be a source of real satisfaction and of pride for our profession, which has stimulated and fostered the reform.<sup>10</sup>

The other modern great improvement in court administration is the correlative one for the *organized* court, or the *integrated* court as it is more generally termed, the court with definite businesslike leadership covering a wide area as a unit and not as little isolated independent units or conflicting groups. The movement for the integrated court also started with the federal courts. It began with the Administrative Court Act of 1939 creating the Administrative Office of the United States Courts.<sup>11</sup> Since then it has been taken up, and the central idea of the administrative office has been widely adopted. Some twenty-eight states now have it.<sup>12</sup> What should occur behind and with this, the underlying unified organization of the entire court structure, has not gone as far. As yet, the only place where it has been completely achieved is our new Commonwealth of Puerto Rico. It is a source of pride to me that I had a share in that development, serving as consultant for the new Judiciary Act of 1952. That was as stimulating an experience as I ever had; the island legislators, executive office, and supreme court acted in effect as founding fathers, rising to the responsibility and the need of original action, freeing themselves of the inhibitions of the past. The result is a real triumph of professional organizing and execution.<sup>13</sup>

<sup>9</sup> See references, note 7 *supra*. The pending extensive movements are noted in current issues of the *Journal of the American Judicature Society*.

<sup>10</sup> Unlike the English movement, which was lay inspired and carried through, as noted below. See note 19 *infra*.

<sup>11</sup> 28 U.S.C. §§ 601-610 (1958).

<sup>12</sup> See references in 43 J. AM. JUD. SOC'Y 25 (1959); 44 J. AM. JUD. SOC'Y 104-105 (1960); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 29-64 (1949); A.B.A. HANDBOOK, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 27-34 (3d ed. 1952), 11-19, 137-39 (4th ed. 1961).

<sup>13</sup> Clark & Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61 YALE L.J. 1147 (1952); Elliott, "Our Faith in Justice": Puerto Rico

At the same time and during this period there had been a long struggle in my own State of Connecticut for the improvement of the minor court system, primarily the traffic and police courts and the justices of the peace. In this, too, I was privileged to participate. In 1949, as director of a survey unit set up by the Commission on State Government Organization, organized by Governor Bowles, I made a report setting up a form of unified court organization,<sup>14</sup> which after some ten years of agitation has gone into effect.<sup>15</sup> It was a spirited struggle, which only began to make headway when the State Bar Association of Connecticut and the League of Women Voters both took up the program and rendered yeoman's service. Finally Governor Ribicoff gave the final push before going to the national scene in Washington as Secretary of Health, Education, and Welfare; and the new circuit court system, supplanting by a state organized court all the various police, town, city, and justice of the peace courts, came into existence on January 1, 1961. It provided the most advanced form of minor court organization in the continental United States, and appears to be working with quiet efficiency, to the general satisfaction of the public.<sup>16</sup>

Elsewhere, too, the waters of reform are stirring. Thus New Jersey under the leadership of Chief Justice Vanderbilt early set the tone for the whole movement, and many of the reforms advocated by him have never been improved upon. Even in that state, however, the reorganization has been on the upper level of courts, not the minor courts where it is most needed. But there are important reforms along these lines now pending in a whole series of states: Colorado, Florida, Nebraska, New Mexico, New York, North Carolina, Washington, Wisconsin; Iowa, where the provisions were defeated the first time at the polls and will be voted on again this fall; Illinois, where the prospects seem good; and at length in Maine, where at local request there was prepared by the Institute of Judicial Administration an outstanding report setting up a com-

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*Shows the Way to Better Courts*, 42 A.B.A.J. 24 (1956). The valuable annual reports of Puerto Rico's Administrative Director of its courts show that this early promise is being fulfilled.

<sup>14</sup> FINAL REPORT OF SURVEY UNIT NO. 18 OF COMMISSION ON STATE GOVERNMENT ORGANIZATION (Conn. 1949, mimeo.); REPORT OF COMMISSION ON STATE GOVERNMENT ORGANIZATION 61 (Conn. 1950); Clark & Clark, *Court Integration in Connecticut: A Case Study of Steps in Judicial Reform*, 59 YALE L.J. 1395 (1950); Clark & Clark, *A Proposal for Court Reform in Connecticut*, 24 CONN. B.J. 385 (1950).

<sup>15</sup> CONN. GEN. STAT. §§ 51-243 to 51-274 (Supp. 1959). See DIRECTORY AND MANUAL, CIRCUIT COURT OF CONNECTICUT (Jan. 1, 1961); 43 J. AM. JUD. SOC'Y 25, 26, (1959); 42 J. AM. JUD. SOC'Y 199 (1959); E. Clark, *Court Reorganization in 1959: A Time for Constructive Action*, 32 CONN. B.J. 236 (1958); McCormick, *The Struggle for Probate Court Reform*, 33 CONN. B.J. 267 (1959).

<sup>16</sup> Complaints have involved only minor and soon corrected details. Informal polls of the bar have shown approval. Opinions of the new court's appellate tribunal now appear regularly in the reports known as the *Connecticut Supplement*.

plete district court system, which in due course has been adopted by the legislature.<sup>17</sup> In at least three-fourths of the states there has been this drive for improvement in court organization.<sup>18</sup> It is gratifying to note that, even if the federal courts may be held to have started the movement, the states are now going beyond the federal model to provide not only for a central administrative office, but also for a revamped court structure. That is as it should be, because now, in turn, it should be their function to pull the federal courts forward. I am gratified to add that all this is a reform professionally inspired and professionally developed, quite unlike the similar 100-year struggle in England, which was led and sparked by laymen.<sup>19</sup> It is a development, now continually broadening and expanding, which does honor to the profession and of which the profession may well be proud.

Now I shall turn to the other branch of the discussion I have planned, namely, a consideration of the federal courts as active and continuous instruments of national progress. This we see every day. I referred to it earlier in speaking of all the new types of federal rights and of litigation constantly arising which involve entirely novel issues. Here the tone is set for us by the legislature or perhaps by the executive as leader in recommending new legislation of vast and extensive character. A striking example of what this means was presented on my first visit to Puerto Rico as member of a commission composed of continental and island lawyers and public officials sent to determine the extent of the application of general federal regulatory laws to the new commonwealth. Though I remain grateful for this introduction to a most progressive community, the actual assignment was really so simple that it hardly deserved attention. For we found, as should have been expected, that the national laws applied everywhere, and certainly to this part of our country. One had only to study the wide coverage expressly stated by Congress as to the National Labor Relations Act, or the various securities acts, or the like; these showed by their terms that Congress intended them to apply to all states, territories, and possessions without exception. And this was our conclusion.<sup>20</sup>

In my judgment this trend toward nationalism must continue. I do not see how it can possibly be stopped; moreover, I do not think it should

<sup>17</sup> On the Maine reform, see A DISTRICT COURT FOR MAINE, REPORT BY THE INSTITUTE OF JUDICIAL ADMINISTRATION, Legislative Research Committee Publication No. 100-4, January, 1961; 45 J. AM. JUD. SOC'Y 75 (1961); 44 J. AM. JUD. SOC'Y 224 (1961).

<sup>18</sup> Again the columns of the *Journal of the American Judicature Society* may be examined for all the late developments throughout the country.

<sup>19</sup> Compare Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926).

<sup>20</sup> REPORT OF PRESIDENT'S ADVISORY COMMISSION ON THE RELATION OF FEDERAL LAWS TO PUERTO RICO (1949).

be. For the national government is there to work for all of us and in all sorts of ways. One need only mention the social security legislation, to cite an outstanding example which is affecting all of us and which by the way is supplying us with a great deal of judicial business. This steady development serves to convince me that I am speaking the language at least of the future in urging a judicial awareness and acceptance of this trend to national unity.

This brings me to the bearing on our subject matter of the three presently important doctrines of the Supreme Court about which I wish to speak. These are, first, the use of federal habeas corpus to review state criminal convictions; second, the extreme resurgence of state law in the federal courts as an outgrowth of the teachings of *Erie R.R. v. Tompkins*;<sup>21</sup> and finally, that willful, perhaps even illegitimate, child of the *Erie-Tompkins* rule, namely, the "abstention doctrine." As will be seen, the first seems a desirable, even a necessary step toward making this a really great country not only in our own eyes, but in the eyes of the world generally. But as to the other two, I am most doubtful; indeed, I seriously question if they do represent the way of the future.

First we may note the developing law as to the federal habeas corpus. This is truly a troublesome part of our appellate jurisdiction. In individual cases I find it very burdensome because continuously we are having to review the careful judgments of two great state courts, the New York Court of Appeals and the Connecticut Supreme Court of Errors.<sup>22</sup> This is an embarrassing jurisdiction. Moreover, it is a heavy one, vastly increasing our judicial business. In fact it has gone so far that we have had to appoint a special clerk to assist us in processing these cases. When I was chief judge of our court I had a daily correspondence with the inmates of all the various New York prisons. Often I would have to pay postage due, to obtain delivery of these handwritten, almost illegible requests for federal intervention. This whole course of judicial trend is a vastly interesting one; while for the individual judge the task is heavy, yet the total effect on the administration of the criminal law I am quite sure is wholly to the good.

In a notable lecture at Harvard, one of our great state judges, Justice Schaefer, pointed out that this trend is due not entirely or perhaps even mainly to definite Supreme Court rulings, but is more the result of a growth in knowledge by the prisoners, aided by the privileges granted in the prisons of allowing the inmates to study judicial cases and authorities.<sup>23</sup> It is a fact that any decision of our court or of the Supreme Court

<sup>21</sup> 304 U.S. 64 (1938).

<sup>22</sup> As yet we have not been called upon to review such a judgment of the third great court in our circuit, the Supreme Court of Vermont, though it is rumored that at least one such case is on its way to us.

<sup>23</sup> Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).



in this field will be known all through the prisons of our local area within a week, by which time there will be petitions coming to us citing and quoting them. As an interesting facet of the problem, it might be noted that the warden of the Clinton State Prison for incorrigibles at Dannemora, New York, is reported to look upon this judicial trend with favor, since it makes possible the best therapeutic treatment he can find for his patients. Thus the inmates are all studying law and drafting petitions to the judges; even though most of them may not have substance, it does give the prisoners an interest in life and a hope which does marvels for their morale.

In truth, however, the administration of the criminal law has not been all that it should be throughout the Union. Thus the problem arises even in my own state, where we have fondly thought that justice was pretty well administered, but where, as it turns out, there are police practices of which we cannot be proud. In a recent case a Negro accused of murder was taken without a warrant to the prosecutor's office, handcuffed to his chair, and cross-examined steadily from 11 a.m. to 11 p.m. Even more, he was fooled into thinking that like pressure was being exercised on his wife until he finally confessed to save her. That particular case has been pending through the courts for some time until at long length it has been reversed by the Supreme Court of the United States.<sup>24</sup> And there are other disquieting cases.<sup>25</sup> But it is perhaps a hopeful sign that one of the youthful prosecutors frankly stated that he and his colleagues were troubled by these reversals, that they did not want to engage in illegal practices and were trying to improve their procedures, and that it was their desire to do what was required by the highest court and to do it quite honestly and consistently. So I do believe we can perceive a marked improvement in criminal law administration in the courts which come under our notice.

In this connection Justice Schaefer in his Holmes lectures at Harvard has a statement that is quite true and directly in point, namely, that, while considerations of federalism of course remain important, yet "in the world today they must be measured against the competing demands arising out of the relation of the United States to the rest of the world. The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law. That measure is not taken merely in retrospect by social historians of the future. It is taken from day to day by the peoples of the world, and to them the crim-

<sup>24</sup> *Rogers v. Richmond*, 365 U.S. 534 (1961).

<sup>25</sup> See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961), reversing *State v. Culombe*, 147 Conn. 194, 158 A.2d 239 (1960); and compare *U. S. ex rel. Reid v. Richmond*, —F.2d— (2d Cir. 1961).

inal procedure sanctioned by any of our states is the procedure sanctioned by the United States."<sup>26</sup> So even if individual decisions may seem to push rather far, the desirable trend is unmistakable.

I shall now turn to the other two doctrines that I wish to explore. At the very time that this trend of nationalism was happily developing in 1938 there came the ruling in *Erie R.R. v. Tompkins*<sup>27</sup> that it was illegal, nay, unconstitutional, for the federal courts not to apply state law in the cases that came to the federal courts in their diversity-of-citizenship jurisdiction over actions by citizens of one state against those of another. This is a type of local jurisdiction placed in the federal courts, as opposed to the other great branch of our jurisdiction, that of the federal question which covers the cases about which I have heretofore been speaking. The original *Erie* decision was perhaps not one to raise overmuch question, even though it did overrule a decision of one hundred years' standing, that of *Swift v. Tyson*.<sup>28</sup> For I believe it clear that judges in general sitting in the federal courts would wish to apply the same law where applicable as did their state brothers in like case. It is not the basic principle of *Erie*, but rather the extent to which it has been pressed, which causes us trouble. Particularly is this true when it is said that anything which significantly affects the outcome of the action must be held a matter of state law.<sup>29</sup> This can reach even to matters of mere procedure, so that federal advances in that area must be rejected in a particular case for the outworn practices of a backward state.<sup>30</sup>

Such a rule carries this very delicate question of federalism, of the interrelationship of federal and state rights, to an extreme, even, I suggest, to an absurd extreme. Consider, for example, a question that has not yet been finally decided, but is continually recurring, namely, the problem of trial by jury. The specific issue is often as to the sufficiency of the evidence in a civil action to present a jury question. If you press the *Erie* doctrine to its ultimate conclusion you must say that, since the ruling here will significantly affect the outcome of the action, it must

<sup>26</sup> Schaefer, *supra* note 23, at 26.

<sup>27</sup> 304 U.S. 64 (1938).

<sup>28</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>29</sup> This is the famous "outcome-determinative" test set forth in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), and since often reiterated. Compare *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), with *Byrd v. Blue Ridge Rural Elec. Cooperative*, 356 U.S. 525 (1958).

<sup>30</sup> Of the many facets of this problem a most interesting one has just appeared in my court. In *Hope v. Hearst Consol. Publications*, 294 F.2d 681 (2d Cir. 1961), the majority applied Fed. R. Civ. P. 43(a) to support a liberal ruling for the admission of certain evidence contrary to the state practice; the dissenting judge, however, arguing at length that *Erie* and *York* compelled a different result, concluded that the decision "I believe puts an end to any of the relevant principles of *Erie v. Tompkins* and *Guaranty Trust v. York*."

be governed by state law. And yet the United States Constitution definitely covers the subject of trial by jury and it does seem a bit extreme to hold state law above and controlling the Constitution of the United States in a court of the United States on this most important personal right.<sup>31</sup>

As *Erie* has been pushed further and further by new ramifications of the "outcome-determinative" test, another and somewhat similar doctrine has emerged which limits the freedom of federal judges to deal with matters of state law. This is the "abstention" doctrine, which says that in certain cases involving questions of state law the federal judge must "abstain" from deciding cases within his jurisdiction until a state court can define the state law in question.<sup>32</sup> This doctrine, always an unfortunate one, has grown considerably from its humble beginning as a discretionary device used to forestall decision of a federal constitutional question in cases involving complicated questions of state administrative and regulatory policy. Moreover, it appears to be employed even in cases where no constitutional issues are present and where no particularly delicate matters of state policy are at stake. It has been used in cases where the court has jurisdiction on diversity grounds, as well as when jurisdiction is based solely on a federal question.<sup>33</sup> Because a majority of the Supreme Court has continued to insist on this principle, it has come to seem more mandatory than discretionary. As a result of this doctrine, individual litigants have been shuffled back and forth between state and federal courts, and cases have been dragged out over eight- and ten-year periods.<sup>34</sup>

Last year a divided Supreme Court decided a case which seems an extreme example of this unhappy doctrine. The case, *Clay v. Sun Ins. Office Ltd.*,<sup>35</sup> was a diversity action brought in the United States District Court for the Southern District of Florida. Before coming to Florida, the plaintiff had taken out a personal property insurance policy with the defendant's Illinois office. His property, now located in Florida, was subse-

<sup>31</sup> See *Herron v. Southern Pac. Co.*, 283 U.S. 91 (1931); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444, 445 (1959); *Byrd v. Blue Ridge Rural Elec. Cooperative*, 356 U.S. 525 (1958); *Trivette v. New York Life Ins. Co.*, 283 F.2d 441, 443-49 (6th Cir. 1960) (Pope, J., dissenting).

<sup>32</sup> *Wright, The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960); Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749 (1959).

<sup>33</sup> For illustrative cases see *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *Meredith v. Winter Haven*, 320 U.S. 228 (1943); and *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960), discussed below. Other cases are cited in *Wright, supra* note 32.

<sup>34</sup> For examples see the authorities cited in note 32 *supra*.

<sup>35</sup> 363 U.S. 207 (1960).

quently damaged; but the insurance company disclaimed liability, contending that the particular damage (done by Clay's estranged wife) was not covered by the policy, and that in any event Clay's action was barred by the one-year-limitation provision of the policy. Clay, however, pointed to a Florida statute making all such contractual limitations upon instituting suit "contrary to public policy" and "illegal and void." The district judge applied this statute and, following a jury verdict for Clay, refused defendant's motion for judgment *n.o.v.* The Court of Appeals for the Fifth Circuit reversed, holding that, since the contract was made in Illinois and the "suit clause" was valid there, the Fourteenth Amendment required Florida to recognize the limitation and to refuse to hear the case. Because of this constitutional ruling, that court did not reach the question whether or not Florida would, in fact, apply its statute to the Illinois-made contract.<sup>36</sup>

With the case in this posture a majority of the Supreme Court held the Fifth Circuit in error in deciding a question of constitutional law before resolving an issue of state law which might make a constitutional pronouncement unnecessary. Then the Court said that the district judge had *also* been wrong to decide that question of state law for himself. For the majority, Mr. Justice Frankfurter said that no federal court could make a "confident guess" how the Florida Supreme Court would construe the statute, and that the proper solution was for the federal court to refer that question to the state court for a decision. So the parties, who had come all the way up through the federal system, now had to repair to the Florida Supreme Court for its opinion of the meaning of the state statute. And still ahead of them lay a further climb through the federal courts, once Florida had spoken.

Actually the question of law involved in the case does not appear to be particularly complex. It called for statutory interpretation of the sort that all our courts have regularly to make. To the dissenting Justices it gave little trouble. For Justice Black, speaking for the three dissenters, the question was quite simple: "The statute's plain language, its interpretation by the experienced trial judge who sat on the case and its interpretation by the Attorney General of the State should be sufficient to show to even the most doubtful that this state law applies to this printed provision of the contract and requires the company to try this lawsuit on its merits."<sup>37</sup> And Justice Douglas added the practical comment:

I desire to give renewed protest to our practice of making litigants travel a long, expensive road in order to obtain justice. . . . Some litigants have long purses. Many, however, can hardly afford one law-

<sup>36</sup> *Sun Ins. Office Ltd. v. Clay*, 265 F.2d 522 (5th Cir. 1959).

<sup>37</sup> 363 U.S. at 216. And so the Florida Supreme Court has now held. *Sun. Ins. Office Ltd. v. Clay*, 30 U.S.L. WEEK 2202 (Fla. Oct. 18, 1961).

suit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.<sup>38</sup>

The reason for forcing federal judges to “abstain” in a case like *Clay*, despite the practical consequences so vividly described by Justice Douglas, seems similar to the reasons which have led to extreme applications of the “outcome-determinative” test. These cases relegate the federal judge to the role of an automaton or, as my late colleague Judge Frank put it,<sup>39</sup> a “ventriloquist’s dummy.” He must, it seems, slavishly follow decisions of state courts, even lower courts, no matter how ill-advised or outmoded these decisions may be, and how unlikely they are now to be followed in the state courts themselves. And he is called upon to follow state practice whenever the issue is “outcome-determinative,” no matter how deep the inroads into federal methods of administering justice.<sup>40</sup> Abstention now pushes the logic one step further: it removes the federal judge entirely from the picture.

In the reasons given for these parallel developments there seems to be present a fear of what federal judges will do if not tightly leashed by doctrinal restraints. Either they will commit plain error or, in the course of deciding matters of “state” law, they will impose *their* values and make policy from *their* point of view. So this will not only increase the risk of later state rejections of the rule, but create the kind of federal-state conflict which leads to forum-shopping.<sup>41</sup> To avoid these evils a Court majority still imprisons our federal judges in the narrow confines of the “outcome-determinative” test or separates them from decision completely by the abstention principle.

Perhaps one reason for these developments is the same discovery about the way our courts work which helped to bring about the *Erie* decision—the realization that the judicial process is not a mechanical process of “finding” or “discovering” an already existing law, but quite often

<sup>38</sup> 363 U.S. at 227, 228.

<sup>39</sup> In *Richardson v. Commissioner*, 126 F.2d 562, 567 (2d Cir. 1942). See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 284 (1946), reprinted in JURISPRUDENCE IN ACTION 53, 83-84 (1953).

<sup>40</sup> Compare notes 30, 31 *supra*. The Court itself has often repudiated extreme applications of the principle. Thus contrast such a case as *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948), with *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940).

<sup>41</sup> See Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1032 (1953). This idea was expressed in the early case of *Thompson v. Magnolia Petroleum Co.*,

the creative job of making new law.<sup>42</sup> This involves also the recognition that ultimately it is only the individual judge or judges to whom adjudication is committed who are responsible for the creation of such new law. Somewhat like the development of atomic energy, these realizations unleashed potent forces which had to be either harnessed or eliminated. Widespread acceptance of the fact that judges in both private and public law cases can, will, and do make policy for the community has had significance throughout the law. It has been especially important in this field of federal jurisdiction, because here we often have judges deciding cases of another so-called "sovereignty." And in this sensitive area and as an abstract doctrine it may be thought strange that federal judges should have the right to "legislate" for the states. But reflection should convince that it is the necessary and indeed desirable result of their exercise of their constitutional and statutory jurisdiction.

So this truth—that the judicial process is creative, not static, that case law is made, not found—has, it seems, contributed to the development of the various forms of federal "abstention" I have been discussing: abstention from the normal judicial job of creative decision-making under *Erie* and abstention from any decision at all under cases like *Clay*. In my view, advanced with deference, this is an attempt to avoid the unavoidable—to ask judges not to judge, not to exercise their judicial capacity or the power of their minds, even though Congress and the Constitution have given them jurisdiction over the case.

I have found a very interesting discussion of the *Clay* case by one of my old students from my teaching days, who shows that fine tolerance and fondness so happily found among one's former pupils. In a law review article last fall Professor Cardozo of Cornell discussed this case<sup>43</sup> and used as a starting point an article by Professor Corbin—authority on Contracts and my colleague for many years—which said that, notwithstanding the *Erie* case, judges had to be judges and could not just be automatons. Professor Corbin felt that federal judges ought to be able to look at the same sources as are available to state judges in deciding issues of state law; to survey all of what he called the "persuasive data," and not just the decisions of the courts. They must, in short, exercise judicial capacity, even if that meant that they would contribute to the growth and change of state law.<sup>44</sup> Then Professor Cardozo mentioned a

<sup>42</sup> Even Holmes thought the federal courts could only "declare," not "make," state law. *Kuhn v. Fairmount Coal Co.*, 215 U.S. 349, 370-71 (1910) (dissenting opinion).

<sup>43</sup> Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. U.L. REV. 419 (1960).

<sup>44</sup> Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941). Professor Cardozo also cites Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290-95 (1946), reprinted in *JURISPRUDENCE IN ACTION* 53, 93-99 (1953).

decision of mine where I had assumed, in Judge Hand's phrase, to look into the "womb of time"<sup>45</sup> and to forecast New York law before it had appeared. There we looked at such "data" as *Corbin on Contracts*, the relevant sections of the *Restatement of Contracts*—drafted in fact by Corbin and Justice Cardozo—federal opinions, the published recommendations of the New York Law Revision Commission, and analogous provisions of New York law to reach a conclusion on the state of New York law which could not have been made by a wooden recapitulation of the law in terms of the old New York cases.<sup>46</sup>

From this, Professor Cardozo, referring to Justice Douglas' dissent in *Clay*, observed that Judge Clark and Justice Douglas were for many years faculty colleagues of Professor Corbin at Yale and, continuing, said: "Maybe the attitude toward the role of federal courts that had been developing in interfaculty discussions in New Haven, in the years prior to the *Erie* decision, was proceeding along a very different course from the attitude being molded in Cambridge, where Felix Frankfurter was still in residence."<sup>47</sup>

On the whole this would seem to be giving the law schools and the law reviews credit for more pervasive influence than is theirs in actuality. But they do play an important part in present-day legal thinking. That is why the recent Great Debate in the potent *Harvard Law Review* as to how well the present-day Supreme Court justices (and inferentially other federal judges) are doing has close relevancy to our subject matter. At any rate the discussion there as to whether the Supreme Court justices are overworked has significant overtones. First Professor Hart charted the justices' day, hour by hour, minute by minute, and even second by second, and decided that they did not have time enough for all their cases.<sup>48</sup> I have seen a good many of the justices in action and I have seen my own colleagues at work. And I cannot imagine a judge apportioning his day by minutes or seconds. We spend time on the cases that draw our attention. And this is certainly true of the Supreme Court justices, which suggests an infallible, if perhaps hardly useful, rule to explain the enigma of the grant of certiorari. As explained to me by a law professor, formerly law clerk to a Supreme Court justice, the cases in which certiorari is granted are those where the justices see an opportunity to

<sup>45</sup> *Spector Motor Serv. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting), *vacated* 323 U.S. 101 (1944), quoted in *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103, 107 (2d Cir. 1953).

<sup>46</sup> *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103, 107 (2d Cir. 1953). Cf. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205-212 (1956) (Frankfurter, J., concurring).

<sup>47</sup> Cardozo, *supra* note 43, at 425.

<sup>48</sup> Hart, *The Supreme Court, 1958 Term. Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). See answer, Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

write worthwhile opinions. What better test can there be? Since the Court cannot take all of the cases offered it, it should well take those where its role will be creative. So this apportionment of judicial time—which has recently been emphasized by no less a person than Dean Griswold himself—<sup>49</sup> seems an interesting question, as is anything concerning the Court, but one a bit irrelevant. After all, the justices control their own time. They determine the intake, and if they are overworked they can stop the flow. Also they may appeal to Congress for further restriction on their jurisdiction.

But the underlying thought that, just because the justices are tired or overworked, their fundamental convictions about law and government somehow become variable is to me dubious and even faintly ludicrous. By the way, some of the justices assert flatly that they are not overworked—an interesting question of fact in itself.<sup>50</sup> I say that, even if they are, the issues that they daily work on are basic, fundamental principles which go back of feelings of the moment. Thus I cannot conceive, no matter how tired Mr. Justice Douglas is—perhaps being tired is something one cannot associate with him—that that is going to make him think differently about these problems. The same is true, I venture to believe, as to Mr. Justice Black or Mr. Justice Frankfurter. The idea that sitting mulling over these problems and hashing them over with one's associates will change basic views is unusual, to say the least.<sup>51</sup>

Let me now refer to another attempt to state a general rule by another scholar, a Columbia professor with close affiliations with his Harvard opposites at Cambridge. Professor Herbert Wechsler, also delivering the Holmes lectures reprinted in the *Harvard Law Review*,<sup>52</sup> has tried to work out the legal principle by which the Supreme Court should decide whether it should adjudicate or should refrain from decision. His view is that the Court should act only in those cases where it would be apply-

<sup>49</sup> Griswold, *The Supreme Court, 1959 Term. Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

<sup>50</sup> Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401 (1960). See also Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960); Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961). Compare T. C. Clark, *Internal Operation of the United States Supreme Court*, 43 J. AM. JUD. SOC'Y 45 (1959).

<sup>51</sup> Dean Griswold seems to be particularly upset at the thought that discussion will not produce a change of conviction or, to put it more bluntly (as he does not), that the views of mature thinking men on basic fundamentals cannot be shifted by argumentative processes. See Griswold, *supra* note 49, at 91-94. I wonder how many members of his own faculty can be shifted in their lifetime views by the sweet reasonableness of argument. Of course there is an area of adjustment—where the case is not yet understood, or the facts remain debatable, or the divisions are not on basic issues, etc. But the questions to which we are addressing ourselves are basic, where convictions run deep. Compare note 60 *infra*; and see also like concern expressed in Fuller, *The Academic Lawyer's "House of Intellect"*, 14 J. LEGAL ED. 153, 157-59 (1961).

<sup>52</sup> Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).



ing principles of adequate neutrality and generality; cases which do not survive this test should not be heard by that Court. This idea, I understand, has achieved present popularity in the law schools. But trying to apply such a test as a working principle and looking at the examples given—about the applicability of which there seems serious division—the conclusion I am compelled to reach seems to be that the cases which interest me always satisfy the principle; and this is particularly true of cases where my colleagues are mistaken and I must dissent. The practical application of this famous principle strikes me as just that personal.

I suggest the real answer to all this attempt to differentiate among issues legally before the court is that it cannot be done in any way which will carry conviction as to those issues left out.<sup>53</sup> And in a broader sense I find the appropriate conclusion to be that expressed by a former law clerk of mine, Professor George Braden, then at Yale. Back in 1948 in discussing "The Search for Objectivity in Constitutional Law," he reached this conclusion, which I suggest is unanswerable and which I believe applies to much more than merely constitutional cases: "There is no objectivity in constitutional law because there are no absolutes. Every constitutional question involves a weighing of competing values. . . . Hence the justice who wants to tell the world how he decides cases . . . must say: 'This is what I believe is important in our civilization and I shall do all I can to preserve it.' And forthwith set forth his creed. If this is too shocking to society . . . , then society must take away the Court's power. There is no middle ground."<sup>54</sup> The same idea I find expressed in other important critiques of the neutrality principle.<sup>55</sup> Of course this is by no means a new concept.<sup>56</sup> In fact since Justice Cardozo's

<sup>53</sup> This is convincingly shown by Judge Arnold in his defense of the Court's grant of certiorari to review state court reversals of FELA verdicts and thus to uphold the constitutional right of trial by jury. Arnold, *supra* note 48, at 1300-1304. Strangely some scholars seem to believe that they have demolished Judge Arnold's "philosophy," without taking note of the practical and common-sense conclusions he has to present on the operation of the judicial process. Compare Fuller, *supra* note 51; and the colloquy between Professors Fuller and Jones, 14 J. LEGAL ED. 165-67 (1961).

<sup>54</sup> Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 594 (1948).

<sup>55</sup> Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. REV. 571 (1960); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Henson, *A Criticism of Criticism: In re Meaning*, 29 FORDHAM L. REV. 553 (1961).

<sup>56</sup> "Judges prefer a formula—for that is what it is—that they merely declare the law and do not make it." RADCLIFFE, *THE LAW AND ITS COMPASS* 38-39 (1960), discussing "public policy" as "an unruly horse," as stated by Burrough, J., in *Richardson v. Mellish*, 2 Bing. 229, 252 130 Eng. Rep. 294, 303 (C. P. 1824). Quoted by Keeffe in his *Practicing Lawyer's guide to the current Law Magazines*, 47 A.B.A.J. 930, 931 (1961). But see CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 115 (1921): "The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom."

*The Nature of the Judicial Process*, it has been made quite articulate.<sup>57</sup>

But, notwithstanding Justice Cardozo's famous lectures and the labors of others, notably the legal realists, the search for some absolutes controlling judicial adjudication still goes on. What a vain hope! Dean Griswold goes so far as to suggest that in one case Cardozo said a perfectly meaningless thing when he said, "Life in all its fullness must supply the answer to the riddle" with respect to a tax question then before the Supreme Court.<sup>58</sup> I must admit that this is a bit flowery, but I think the substance is an appropriate statement. Indeed, I am disturbed by attempts to classify under high-sounding names principles of judicial process which are not so classifiable. There is a new book in this field by Professor Karl Llewellyn, *The Common Law Tradition—Deciding Appeals*, which is being greatly honored by the reviewers. It seems to me, however, that the distinguished author and leading realist has somewhat retreated to the idea that one can state abstract principles of objective generality for the operation of the judicial process.<sup>59</sup> After all, one has to know the individual judge who in much of his work, particularly as to original cases, must sail uncharted seas. Of course he is restrained by many things that are worthwhile: tradition, his own training, his own place in society, and the like. Particularly is he restrained by the obligation to set forth the reasons for his action in language for all to read and for the West Publishing Company to publish and sell to all lawyers at a substantial price. But nevertheless at bottom he is an individual and acts alone. These attempts at explanations to set a course which must be followed I think are unfortunate, because they mislead the lawyers and the public and worst of all they mislead the judge himself and improperly circumscribe his thinking. He cannot avoid his lonely responsibility and should not be told he may. Thus he may appear to rest judgment on some older precedent or past history, but the ultimate job is his.<sup>60</sup>

<sup>57</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), particularly *Lecture III. The Method of Sociology. The Judge as a Legislator*. The same ideas are restated in CARDOZO, *THE GROWTH OF THE LAW* 93-108 *passim* (1924).

<sup>58</sup> Griswold, *supra* note 49, at 90, quoting from the opinion of Cardozo, J., in *Welch v. Helvering*, 290 U.S. 111, 115 (1933), repeated in *Commissioner v. Duberstein*, 363 U.S. 278, 288 n.9 (1960). Note an early expression of this view in CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-15 (1921).

<sup>59</sup> This conclusion is amplified and explained in an article, Clark & Trubeck, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, appearing in the December issue of the *Yale Law Journal*.

<sup>60</sup> Both Dean Griswold and Judge Learned Hand have expressed abhorrence at the thought of being governed by "Plato's wise men" or "a bevy of Platonic guardians," the Dean going so far as to say "it makes me shiver a little bit." Griswold, *supra* note 49, at 93 n.48; HAND, *THE BILL OF RIGHTS* 73 (1958). With deference one may ask where these distinguished men have been all these years. In fact they and we all have settled for something less than "Plato's wise men," and have lived happily in our bondage. I perhaps should add the obvious and natural caution, as noted by commentators

This trend of thinking, this attempt to set up absolute rules and guides, seems to arise out of that same timidity in the face of our realization of the creative role of the judge that attempts to bottle up our federal courts and force them to abstain in one way or another from the job of the judge. Every question of significance that comes before a court involves questions of competing values—constitutional matters are not unique in that. And the choices have to be made, and by judges. To restrain that choice by will-o'-the-wisp rules of so-called neutrality and objectivity is only to guarantee that we will get the less imaginative and creative solutions to our legal problems. Hence I regard these explanatory theses or excuses to be unhelpful or worse. The court and its members have a responsibility which cannot be shared. And when doctrines develop which are at variance with that obligation to a united sovereignty which we in the federal service peculiarly owe, I for one feel a duty to protest. Nevertheless I cannot believe that some of these essentially divisive doctrines—the extreme application of the *Erie* rule, the “abstention” thesis—will last. The idea that Florida might be upset at a decision on these simple questions of law and of the meaning of statutes, as was presented in the *Clay* case, seems to me a bit absurd when we consider that Florida may have its murder convictions upset by a single federal judge on an application for federal habeas corpus.

So, venturing the dangerous role of prophet, I will say boldly that I do not believe these doctrines working against national unity can stand. I suggest as an article of faith that our definite direction is to make ourselves into a very great country, a country in which we all share as equals and in the building of which the federal courts have a large and important role to play. So I come back to my original sense of satisfaction that I may speak to you young people, the law students of the day, who will share so extensively in this noble job of construction. I realize how foolish it is for an inferior judge to prophesy the course of doctrine or the course of Supreme Court decision. But nevertheless, I shall take the risk. I am going to venture the thought—and this you may check fifty years hence—that what I am now saying will be even truer than I believe it to be at this moment.

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from Cardozo on, that the judge's range of choice of law is limited in many traditional ways except in the statistically small, but important area of novel and original issues. See CARDOZO, *op. cit. supra* note 57. This, too, is discussed elsewhere; see note 59 *supra*.